THE

AMERICAN LAW REGISTER.

NOVEMBER, 1863.

MENTAL UNSOUNDNESS AS AFFECTING TESTAMENTARY CAPACITY.

[The following essay, composed by Edmund Wetmore, Esq., of the senior class in Columbia College Law School, received the first prize at the commencement in 1863. The Committee of award consisted of Messrs. Murray Hoffman, M. S. Bidwell, and William Mitchell, of New York. It is but justice to the author to remark that by the rules of the Law School, the length of the essay was limited to a fixed number of pages. His subject is consequently treated with more brevity and condensation than he would have desired. The essay elicited distinct and unequivocal praise from the committee, and the views presented are believed to be worthy of the attention of the profession. T. W. D.]

I. Insanity, as it is recognised in law, appears under two aspects: first, as active insanity or mania, and secondly, as passive insanity. Mania may be either general or partial, and may affect the moral propensities or the intellectual faculties. Passive insanity includes idiocy or imperfect development arising from congenital defect, and imbecility which results from causes supervening after birth. This classification might be extended, and does not include all the distinctions which have been admitted in the Courts, much less all those known to physicians.[1] It is, however, sufficiently exact for the present purpose.

[1] For a distribution more in accordance with medical science, see Copeland's

By a rule of law, as ancient perhaps as the custom of making testaments, no person of unsound mind can make a valid will. The present inquiry will be confined to an examination, necessarily brief, of the manner in which this rule has been applied by the Courts generally, and particularly by the Courts of the State of New York, to the various forms of insanity just mentioned. There can be no controversy concerning the method of application in regard to some of these forms, and it will only be necessary to mention them for the sake of completeness; in regard to others, questions of great subtlety and difficulty perpetually arise.

II. ACTIVE INSANITY OR MANIA.

1. *General Mania.*

a. Medical Definition. Mania is recognised in various forms by physicians, and is usually classified into *intellectual* and *moral* mania, though these latter terms are not accepted as accurate by all psychologists. Among the various definitions of general mania which have been given by medical writers, that given by Dr. Combe is perhaps the most satisfactory and philosophical. He says: "It (mania) is the prolonged departure, without an adequate external cause, from the state of feeling and modes of thinking usual to the individual when in health."[1]

When the disorder involves the whole moral nature, the case is one of general *moral* mania; when it involves all or most of the operations of the understanding, it is general *intellectual* mania.[2]

b. Legal Definition. The legal criterion of the existence of general intellectual mania is that of *delusion.* "The true test of the absence or presence of *insanity*,"[3] says Sir John Nicholl upon

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Med. Dict. *in verb.* insanity. Also Ray's Med. Jour. of Insan. p. 71. (Dr. Ray's is perhaps the best medico-legal classification which has been given.) See also Whart. & Stillé Med. Jour. § 74, *et seq.*

[1] Combe's Obs. on Ment. Derangement.

[2] Whart. & Stil. Med. Jour. §§ 174, 235.

[3] "*Insanity*," as here used, has a meaning equivalent to that of *mania* as understood by physicians, and in the sense in which it is employed in the present essay. A certain amount of confusion in the use of terms is unavoidable when the same words, as is the case with many of the words denoting the different forms of

this point, "I take to be the absence or presence of what, used in a certain sense of it, is comprisable in a single term, namely, *delusion*. Whenever the patient once conceives something extravagant to exist, which has still no existence whatever but in his own heated imagination; and whenever, at the same time, having once so conceived, he is incapable of being, or at least of being *permanently* reasoned out of that conception, such a patient is said to be under a *delusion*,[1] in a peculiar half technical sense of the term; and the absence or presence of delusion, so understood, forms, in my judgment, the only true test or criterion of absent or present insanity. In short, I look upon *delusion*, in this sense of it, and *insanity* to be almost, if not altogether, convertible terms."[2]

General moral mania, as understood in law, is said to consist "in a disorder of the moral affections and propensities, without any symptom of delusion or error impressed upon the understanding."[3]

c. Application to questions of Testamentary Capacity.

No person suffering from general intellectual insanity can make a valid will, as being beyond all doubt a person of unsound mind, but general moral mania, as above defined, has never been held a sufficient ground for annulling a testament. The insanity of the testator, in order to have that effect, must be shown by proof of delusion, which is, of course, characteristic of intellectual mania alone.

2. *Partial Active Insanity.*

a. Medical Definition. Medical writers define partial intellectual mania in which the hallucination is confined to a particular

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mental disorder, have a scientific meaning which is different from their popular signification.

[1] Sir JOHN NICHOLL has elsewhere given a definition of delusion which has been objected to by Lord BROUGHAM, who substitutes a definition which is in turn criticised by Judge DEAN. (1 Am. Law Reg. [N. S.] 519.) The definition above quoted, however, seems to be free from any of the objections suggested in the other cases.

[2] *Dew* vs. *Clark*, 3 Add. 79, (also separately published, though the separate case is now rare.)

[3] *People* vs. *Hopp*, 19 Am. Jour. of Insan. 457.

idea, or train of ideas.[1] Corresponding to intellectual monomania, partial moral insanity is said to consist in the perversion of one or two only of the moral powers."[2]

b. Legal Definition. The law early recognised the distinction between general and partial insanity,[3] and the legal criteria of the existence of the latter are not materially different from those adopted in medicine.

c. Application to questions of Testamentary Capacity.

In the case of *Dew* vs. *Clark*,[4] before cited, it was held that partial intellectual insanity will invalidate a will, provided the latter is the direct unqualified offspring of the morbid delusion. The same view has been generally adopted in this country.[5]

The doctrine of *Dew* vs. *Clark*, and *Greenwood* vs. *Greenwood*, has never been impugned in this country, but has been somewhat disturbed in England by a later decision in the case of *Waring* vs. *Waring*.[6] In that case an extreme position in regard to intellectual monomania, as affecting testamentary capacity, was taken by Lord BROUGHAM in delivering the opinion of the Court, without dissent from Lord LANGDALE, Dr. LUSHINGTON or Mr. T. PEMBERTON LEIGH, by whom the case was heard. Lord BROUGHAM argued that the mind, being one and indivisible, if it is *unsound at all times on one subject, is a diseased mind;* that no confidence can be placed in the acts of a diseased mind, however rational those acts may be, and hence, that a monomaniac cannot make a valid will even when his delusion does not concern the subject of the disposal of his property. He lays down the rule that "the existence of delusions being proved, and their continuance proved or assumed at the date of the *factum*, * * it is wholly

[1] Ray's Med. Jour. of Insan. 152. Whart. & Stil. Med Jour. § 245, *et seq.*

[2] Dean's Med. Jur. 500.

[3] Hale's P. C. 30.

[4] 3 Add. 79. Also, *Greenwood* vs. *Greenwood*, 3 Curties, App.

[5] *Leech* vs. *Leech*, 1 Pa. Law Jour. 179, s. c. Am. Law Jour. Oct. 1851. "A monomaniac may make a valid will, when the provisions of the will are entirely unconnected with, and of course uninfluenced by the particular delusion:" per GRIDLEY, J., *Stanton* vs. *Weatherwax*, 16 Barb. 259.

[6] 6 Moore's Priv. Coun. Cas. 349, (1848.)

immaterial that they do not appear in the will itself," or, of course, that they do not concern the subject-matter of the will. He elsewhere applies the rule to monomania, though its terms do not necessarily include more than general insanity.[1]

This judgment was not received with satisfaction in England,[2] and, as has been already stated, has not been adopted here. Its reasoning seems to be erroneous in at least two respects. (1.) The whole argument rests upon the assumption that the *seat* of mental disorder is the mind itself—that the *mind* is the *thing diseased*.[3] But, in truth, the actual *seat* of the disease is absolutely unknown. Three theories prevail upon the subject among physicians: the Psychological theory, maintained by those who make the immaterial essence of the mind the seat of insanity; the Somatic theory, adopted by the Phrenologists, who locate the disease in the brain; and the intermediate theory, derived from Aristotle, and which is a compromise between the other two.[4] None of these theories are established, and, from the nature of the case, none ever can be. The rule of *Waring* vs. *Waring*, therefore, is founded upon a fact which is assumed, but not proved, viz.: that "the essence which we call mind" is the seat of insanity. (2.) But, even if this could be established, the next step in the argument is also conjectural. Granting that, in insanity, the mind is the seat of the disease, and that, being indivisible, it cannot, in such a case, with strict metaphysical accuracy, be said to be sound in any part, it does not follow that a diseased mind may not perform most of its functions as well as a healthy mind. Certainly the contrary cannot be asserted, in view of the imperfect knowledge we possess of the manner in which the mind acts, and with

[1] The doctrine of *Waring* vs. *Waring* has usually been considered *at variance* with that propounded by Sir JOHN NICHOLL in *Dew* vs. *Clark*, and is so stated in most, if not all of the writers on medical jurisprudence. The rule laid down by Lord BROUGHAM, however, is not so much a *variation* from that of *Dew* vs. *Clark*, as an extension of the latter. See Sir JOHN NICHOLL's remarks in the beginning of his opinion in *Dew* vs. *Clark*, and the quotations from that opinion in *Waring* vs. *Waring*.

[2] See the remarks in 12 Lond Jur. 513, (Part II.)

[3] Whart. & Still. Med. Jour. § 79, *et seq.*

[4] Sir Wm. Hamilton's Metaphysics, 272–273.

the impossibility which exists of forming even a conception upon the subject; nor can the contrary be presumed without violating the legal presumption in favor of sanity.

To draw an analogy, which is not perfect, but which is suggestive, the eye, although indivisibility cannot strictly be predicated of anything material, may be called indivisible when considered as a single organ. A slight change in the convexity of the pupil of that organ makes it a diseased eye, and it cannot perform its legitimate function of producing the sensation of sight in regard to distant objects. Yet, the same organ, acting through the same diseased part, performs another function—that of producing the sensation of sight in regard to objects near by—as well as an eye entirely sound. It is possible to conceive that the mind may act in the same manner. But, however this may be, no rule of law should be based upon conjecture. All that is known of mental unsoundness is of its effects. Among these effects, it is a well established fact that a person may be able to talk and act rationally in regard to most subjects, while the same person is unable to talk and act rationally in regard to one or two subjects, and this fact is all that the law can take cognisance of. It is perhaps sufficient to condemn the rule under discussion, that, if carried out, according to its terms, it would render Dr. Johnson, Pascal, and Napoleon incompetent to make a will, for all of these were subject to continuous insane delusions on one or more particular subjects.[1]

Partial moral insanity, in the same manner as general moral insanity, is not of itself sufficient to render a will invalid, if without cognate mental delusions.

There is a difference, it will be observed, between the legal and medical theory of active insanity, in regard to the criterion of delusion. Delusion is essential to the legal idea of mania, but physicians do not attach the same importance to this feature of the disease. Insanity may doubtless exist without discoverable delusion, but it is difficult to conceive how the former could be

[1] Whart. &. Still. §§ 22–32. Pascal constantly imagined that he was near the edge of a dangerous precipice.

judicially established unless delusion of some sort was proved. The point, however, has never come up for direct adjudication.[1]

III. PASSIVE INSANITY.

1. Under this head is included, first, *Idiocy*, or a total absence of intelligence owing to congenital defect. It is sufficient simply to mention this condition of mental unsoundness, as its existence is so easily established that few debatable questions can arise in regard to it.

2. Secondly, *Imbecility*. This is defined by physicians to be an "abnormal deficiency"[2] of the intellectual or moral faculties, arising after birth. It admits of degrees, and has been classified by at least one writer.[3]

Great confusion has existed in regard to the legal consequences of this form of mental unsoundness, and few legal questions have been the subject of more discussion than those arising upon the testamentary capacity of imbeciles. A brief historical summary of the course of adjudication upon this point may serve to dissipate much of the confusion in which it has been involved, for, as a late writer well remarks, "the reason for most of our rules of law is to be sought, not in their philosophy, but in their history."[4]

I. History of the English doctrine concerning imbecility before the Statute of Wills.[5]

a. Rule in the Ecclesiastical Courts. The Ecclesiastical Courts exercised jurisdiction over wills of personal estate from their foundation.[6] The rules which controlled their decisions, in matters which came within their jurisdiction, were obtained from the civil law and the canon law.[7]

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[1] It is scarcely necessary to mention the subject of drunkenness and active insanity produced thereby, as the general rules above stated apply to all cases of mania without reference to the exciting cause. The subject of lucid intervals is a distinct branch of the general topic which the limits of the present essay do not allow the writer to enter upon.

[2] Ray's Med. Jur. of Insan. 71.

[3] Hoffbauer. Ray's Insan. *ubi sup.*

[4] Maine's Ancient Law. (London, 1861.)

[5] 32 Hen. VIII. Explained 34 & 35 Hen. VIII.

[6] 1 Reeve's Hist. of Eng. Law 72.

[7] *Harwood* vs. *Goodright*, Cowper 90. *Cartright* vs. *Cartright*, 1 Phillim. 99.

1. The rule of the Civil Law, in regard to the degree of mental unsoundness which would invalidate a will, was expressed in general terms, and would include imbecility not amounting to idiocy. The words of the Digest are: *In eo qui testatur, ejus temporis quo testamentum facit, integritas mentis non corporis sanitas exigenda est,*[1] and *furiosi* are the only persons disabled on this account in the Institutes.[2] Indeed much more rational ideas regarding mental alienation prevailed among the Romans than were entertained during the succeeding period of the Middle Ages, and these ideas naturally left their imprint upon their laws.[3]

2. The canons[4] which affected England contain no provisions upon the subject of testamentary capacity, and the rules of the civil law were, therefore, the sole guides of the ecclesiastical decisions.[5]

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[1] Dig. Lib. xxviii. tit. 1, § 2. The words are taken from the writings of Labeo. Also *id.* § 17. *In aversa corporis valetudine mente captus eo tempore testamentum facere non potest,* fr. Paulus Lib. III. Sententiarum, "*mente captus,*" incorrectly translated 'idiot' by Colquhoun. Civil Law, vol. ii. p. 224. Cf. Leverett's Lex, *in verb. Capio.* "Cic. *captus mente,* out of one's wits; mad. So Tacit. *captus animi,* crackbrained. Liv. *mens capta,* crazed."

[2] *Item furiosi quia mente carent.* Inst. Lib. ii. tit. xii. § 1, in an enumeration of those who cannot make a will. The citations in the text and in the note comprise, it is believed, the only passages in the Corpus Juris Civilis in which the degree of mental alienation sufficient to avoid a will is directly stated.

[3] Morel. Traité des Maladies Mentales, Liv. Pr. Ch. 1, 2 and 3. The superiority of the ancient theories of mental disease will readily appear by a comparison of the writings of Hippocrates, Galen, Aretæus, Seranus, Cælius Aurelianus, or even of Aristotle and the other philosophers, with so modern a book as Burton's Anatomy of Melancholy, or with the works of the French physicians preceding Pinel and Esquirol.

[4] These are collected and translated in Johnson's Church Law and Canons. 2 vols

[5] Lynwode in his Digest of the Ecclesiastical Laws, has a note which shows that the number of those disabled from making a will of personalty was quite large, and that less than a total deprivation of reason was a ground for the disability: he says: "*Sunt multi alii qui testamentum facere non possunt, utque furiosis, item carentes quibusdam sensibus, item qui propter morbi acerbitatem non possunt articulate loqui nec scribere,*" etc. After a further enumeration he cites Cardi. Lib. vi. "*Qui ibi recitat plures personas quibus non licet testari.*" Provinciale Lib. iii. fo. xcii, note a. (orig. ed. 1422.)

Questions of testamentary capacity were thus decided in the English Courts of Probate for many centuries, in conformity to rules which did not fix a definite limit to the degree of mental infirmity in the testator which would render his will invalid. These Courts, too, were tribunals where the strict rules of practice and pleading which belonged to the Common Law Courts were unknown, and where much was left to the discretion of the Judge. Each case of disputed capacity was decided in a manner arbitrarily, and by a consideration of its peculiar circumstances.[1]

b. Rule in the law Courts during the same period. Mental unsoundness was, meantime, the subject of judicial investigation in the law courts, although not in relation to testamentary capacity.

The former question came before these tribunals in cases of contracts, various writs of inquest, and in the construction of several statutes, as well as in criminal cases.[2] The decisions upon these different cases turned in some instances upon the validity of a return to an inquest which return was traversable as a matter of right,[3] and in others upon questions of pleading, in which it became necessary to assign a definite meaning to the terms used to express mental unsoundness.[4] In the writs of inquest *de idiota inquirendo*, *de lunatico inquirendo*, and others, the prerogative right of the crown to the property of the alleged lunatic, or to the control of that property, was at issue, and the object was to confine that prerogative to narrow limits.[5]

The result was that, at the time of the Statute of Wills, the various terms expressing mental unsoundness had, from the

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[1] Swinburne's enumeration of those incapable from defective intelligence of making a valid will, includes not only the *non compotes* of the Common Law, but others not included in Lord COKE's definition of the former, (1 Co. Inst. 246.) Swinb. Wills, part 2, § iii. *et seq.*

[2] E. 9. Stat De Prerog. Regis. 17 Edw. II. Ch. 9 & 10. Stat. of Fines, 18 Edw. I. Stat. 23 Eliz. Ch. 3, sec. 3. Stat. of Lim. 21 Jac. I. Ch. 16, § 2–7. Stat. 4 & 5 Anne, Ch. 3, 16, § 18. Disability as to contracts; Bracton 5, 4, *id.* 20, fo. 420. Feoffments, *id.* 5.

[3] Matter of Mason, 1 Barb. 436, 1 J. Ch. 60.

[4] Year Book, 39 Hen. VI. 42 B.

[5] Barnsley's Case, 3 Atk. 168. 1 Blk. Com. 302. 1 Ridg. Cas. Par. Lord Ely's Case, App.

decisions above referred to, come to have a common *legal definition* in the law and equity courts, importing "a total deprivation of understanding,"[1] There was, therefore, a theoretical difference at this time between the standards of mental unsoundness in the Common Law and in the Ecclesiastical Courts. It is, however, of course to be remembered that, owing to the imperfect knowledge of insanity then possessed, which was recognised only in its most evident forms, there could have been no great, although there was probably occasional, difference in the application of these standards to the actual cases, as they arose.[2]

II. English doctrine from the Statute of Wills to the present time.

The common law courts now took cognisance for the first time of questions of mental unsoundness as affecting testamentary capacity. In passing upon this question, however, although "*non sane memorie*"[3] the disabling words of the statute had acquired a legal meaning, they did not apply the same stringent rules which prevailed in the other cases in which mental unsoundness was involved. In the earliest reported case after the passage of the statute, where the question was involved, it was said: "By law it is not sufficient that the testator be of memory when he makes his will to answer familiar and usual questions, but he ought to have a *disposing* memory, so that he is able to make a disposition of his lands with understanding and reason; and that is such a memory which the law calls sane and perfect memory."[4] Substantially the same rule is laid down in the next reported case.[5] This liberal construction of the Statute of Wills may reasonably be attributed to the influence of the Ecclesiastical Courts, which influence would naturally be felt in regard to a subject over which they had so long exercised jurisdiction.[6]

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[1] Coke, 1 Inst. 246, § 405 of Lit. 1 Ridg. Cas. Par. 533.

[2] Shelford on Lunacy, 307, 308, (side pag.,) note (v.)

[3] 34 and 35 Hen. VIII.

[4] Winchester's Case, 6 Co., 23 *a*.

[5] Combe's Case, Moore R. 759.

[6] Though neither the Courts of Common Law nor the Court of Chancery owed any positive obligation to follow the Ecclesiastical tribunals, they could not escape

In the course of time a relaxation of the ancient rule regarding the degree of insanity which would uphold a writ *de lunatico* also took place,[1] and "unsoundness of mind" came to be recognised as a term expressing a condition of mental alienation which had not hitherto been a ground of legal incapacity, and which, as defined by Lord ELDON,[2] would include most of the cases coming under the medical definition of imbecility. The introduction of the term "unsoundness of mind," in its extended sense, into the law did away with even the theoretical difference which existed between the rules of the Ecclesiastical and of the Law Courts upon the subject of mental incapacity. That difference had long been one of expression merely, and thenceforth the same standard in all cases was recognised in both tribunals. This standard suffered some modification to make it keep pace with the advance in medico-legal science during the present century. The rule of testamentary capacity, as now received in England, may be gathered from the following statements taken from a recent case in the Court of Probate,[3] in which Sir C. CRESSWELL "directed the jury that the deceased would not be incapable of making a will if he was able to understand the nature of the property he was disposing of, to bear in mind his relatives and the persons connected with him, and to make an election as to the parties he wished to benefit. It was not enough on the one hand that he should be able to say 'yes' or 'no' to a simple question; nor, on the other hand, was it necessary that he should be a well-informed man or a scholar. He might be stupid, dull or ignorant, but if he understood the nature of his property and could select the objects of his bounty, that would be sufficient."

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the potent influence of a system of settled rules in the course of application by their side." Maine's Anc. Law, 173.

[1] *Gibson* vs. *Jeyes*, 6 Ves. 273. *Ridgway* vs. *Darwin*, 8 Ves. 65, (1802,) per Lord ELDON; *ex part.* Cranmer, 12 Ves. 445, (1806,) per Lord ERSKINE. Shelford on Lunacy 5, (side p.)

[2] "Such a state of mind as to be contradistinguished from idiocy, and also from lunacy, and yet such as made one a proper object of a commission in the nature of a commission to inquire of idiocy or lunacy." Dean's Med. Jur. 471.

[3] *Skipper* vs. *Bodkin*, (Dec. 8, 1860,) reported in Wins. Psyc. Jour. for 1860. See also *Greenwood* vs. *Greenwood*, 3 Curteis, App. 2, and *Marsh* vs. *Tyrrell*, 2 Flagg 122.

The substance of the historical facts above narrated is this: The words "non sane memory" of the Statute of Wills had been used in law with other expressions, to designate a state of mind not distinguishable from idiocy; in construing the Statute of Wills, however, the Law Courts did not confine the language employed to its technical meaning, although that meaning was still strictly adhered to in other cases,[1] but adopted a standard of testamentary capacity not different from that of the Ecclesiastical Courts. The latter Courts followed the rule of the civil law, and had no technical standard of testamentary capacity. In the course of time the technical meaning disappeared even in the Law Courts, and a uniform standard of mental incapacity was established and has since been maintained.

These facts, which have been hitherto unnoticed, serve to explain the apparent discrepancy between some of the early English decisions upon mental unsoundness, besides discovering the sources of some errors regarding the English doctrines upon that subject.

III. Decisions in New York bearing upon the question of imbecility as affecting testamentary capacity.

The extension of the jurisdiction of Chancery over those not included in the strict legal definition of the term *non compos mentis*, which took place in England during the time of Lord ELDON, was early adopted in this State, and the term "unsoundness of mind" was recognised in the sense in which it was used in the English decisions and statutes, as importing something different from idiocy or lunacy.[2]

The first important New York decision involving the question of the testamentary capacity of imbeciles, was that in the well-known case of *Stewart* vs. *Lispenard*.[3] This case has been overruled so far as it conflicts with the decision upon the Parish Will, but all of the doctrines there enunciated were not necessarily repudiated.

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[1] Ridgeway's Cas. Par. *ubi sup.*

[2] Matter of Barker, 2 J. Ch. R. 232; Matter of Wendell, 1 *id.* 100; Matter of Morgan, 7 Paige 236.

[3] 26 Wend., 254, (1841.)

The error in the reasoning of Senator VERPLANCK, who delivered the leading opinion in the Lispenard case, seems to have arisen from inattention to the changes above noticed, which had occurred in the English law. His argument is as follows: The right of testamentary disposition is a natural right, and therefore to be restricted no farther than necessity requires; the exception in regard to persons of unsound mind refers to a condition known to the law, and there exactly defined to consist in a "total deprivation of understanding"—equivalent to idiocy, and any degree of mental capacity above that of an idiot is therefore sufficient to sustain a will, if there is no suggestion of fraud or undue influence.[1]

1. In regard to the natural right of testamentary disposition, this has, doubtless, been a prevailing idea in the courts from an early period. Grotius and the other publicists of the seventeenth century, all authoritatively state that the power to make a will is part of the *jus naturale*,[2] and the doctrine has been repeated in our own and in English decisions. Within late years, however, this proposition has been disputed, and there is now a marked tendency in some directions to accept it only in a modified form.[3]

2. Nor are "total deprivation of understanding" and "idiocy" of themselves convertible terms, and it does not follow that they were used as such in law, because an idiot was defined to be "one who hath *wholly* lost his understanding," for others besides idiots may likewise have wholly lost their understanding. To have "wholly lost one's understanding," said Lord ERSKINE, "does not require such a state that" a person "could not see the light of the sun or know his own father."[4]

3. It will, moreover, be observed that, in the argument of Senator VERPLANCK, no account is taken of two facts, viz.: *first*, that the legal definition attached to "*non compos mentis*," as that term was defined by Lord COKE,[5] did not apply to the Ecclesiastical Courts, and was not insisted upon in the Law Courts, in cases of

[1] 26 Wend., pp. 298, 306.

[2] Maine's Anc. Law, 175.

[3] See New York Laws, 1848, ch. 319, and 1860, ch. 607. Maine's Anc. Law, 176–7.

[4] 12 Vesey, 445.

[5] 1 Inst., 246, *b*.

testamentary capacity; and, *second*, that the term "unsound mind," as used in the New York revised statutes, was one which had acquired a more extensive signification than the ancient legal expressions denoting mental deficiency. The authority for the legal definition of mental unsoundness, insisted upon in the case, is derived mainly from cases where the question of testamentary capacity was not in issue, and the authorities cited to show that this meaning was used in cases where that question was in issue, do not sustain the position.[1]

The final uniformity of the rules which prevailed in the Courts having cognisance of wills of personalty, and those having cognisance of wills of real estate, and the substantial uniformity in the *application* of different rules, while the rules of the two Courts were different, was the probable cause of the erroneous view that there had never been any dissimilarity in the legal and ecclesiastical standards of testamentary capacity,[2] and that the New York Statute of Wills should therefore be construed in accordance with the old legal definition of *non compos mentis*.

The foregoing statements, however, in regard to the rule of the English courts since the time of Lord Eldon, must not be received without also keeping in view the fact that the actual standard of testamentary capacity, until a comparatively modern period of the law, conformed to the imperfect theories entertained upon the subject of mental disorders.

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[1] The authorities cited in direct support of his argument, by Senator VERPLANCK, are as follows:—

I. Coke, 1 Inst. 246 (Defin. of *Non Comp.*); Comyn's Dig. Tit. *Idiot*, A.; F. N. B. 233 (Defin. of "Idiot").	I. All of these common law before the Statute of Wills, or common law definitions without reference to the Statute.
II. *Barnsley's Case*, 3 Atk. 167.	II. A commission *de lunat.*, and substantially overruled in 6 Ves. 273, 8 Ves. 65, and 12 Ves. 445, before cited.
III. Shelford on Lunacy 37, and Id. 39.	III. The first citation satisfactorily answered in Mr. O'Connor's argument for the Contestants of the Parish Will, p. 236. The second citation loses its intended force when read in connection with Chap. I. of the same work, pp. 5 and 6.
IV. Swinburn on Wills 127 and 128.	IV. The same is true of this citation. Cf. Swin., Part II., § 4 *et seq.*

[2] The change in the time of Lord ELDON is *noticed*, but its effect misstated, 26 Wend. 300.

What was understood in the old law as madness or lunacy was easily established. The abnormal condition of the mind was recognised only when marked by unmistakeable exhibitions of violence or delusion. It was scarcely attempted, however, to draw the distinction between dementia, or passive insanity, in its different degrees, and mere weakness of intellect, while the former was not known to possess any positive symptoms by which to distinguish it from the latter. Seeking to establish a rule, however, which should have some certainty, the courts held that whenever a person possessed *any* understanding he was not *non compos*, but they did not and could not give any criteria[1] by which the presence or absence of understanding could be established. The rule was not precise, because it did not define "understanding." In one sense the capacity to answer "yes" and "no" intelligently implies a certain modicum of understanding; *i. e.*, the possession of an intelligence, however small, differing in *kind* from that possessed by brute animals, and which is therefore denominated understanding, and it is in this sense that the word is taken in the Lispenard case. Whether or not the rule was ever employed in such an extremely restricted sense, however, a different rule has long since been adopted in the English courts, and is now the prevailing, if not the settled, doctrine in this country. The distinction between the two rules consists simply in this: By the Lispenard doctrine it is maintained that any person endowed with the minutest amount of *human* intelligence has the legal capacity to make a will. The later view is, that testamentary capacity lies somewhere in that doubtful ground where mere weakness ends and idiocy begins. A "sound and disposing mind and memory" are required. This must refer to a positive thing; there must be *some* mind, or it is absurd to speak of a *disposing* mind. The adjective cannot qualify a nullity.

The Lispenard case was followed in New York, though not with-

[1] It is scarcely necessary to notice the antiquated tests of the old abridgments. Even Swinburne, writing in 1590, ridicules them, *e. g.* "*Quid? estne statim fatuus quisquis non potest demonstrare patrem? Absit—nam, ut concedam, filium illum merito sagacem dici, suum qui novit patrem.*" Swin. Will. 48, *a.* Note *c.*

out protest, in *Blanchard* vs. *Nestle*, 3 Den. 37; *Osterhaut* vs. *Shoemaker*, Id. in note; *Newhouse* vs. *Godwin*, 17 Barb. 246; *Clark* vs. *Sawyer*, 2 Coms. 498; and in *Thompson* vs. *Thompson*, 21 Barb. 116; in which case Judge CLERKE delivered a dissenting opinion, upon the ground already noticed, that "unsoundness of mind" had been admitted as a legal term in a different sense from that in which it had been formerly employed.

The whole question of testamentary incapacity arising from imbecility received a thorough and exhaustive discussion in the case of the Parish Will. The facts of this case are too recent to need recapitulation. The counsel for the proponents pursued the same line of argument as that previously taken by Senator VERPLANCK, and fortified the conclusion by the citation of various additional authorities.[1] These authorities were however, as in the former instance, either taken from cases arising upon questions of pleading or writs *de lunatico*, in the law or equity courts, or, where they were taken from decisions upon questions of testamentary capacity,

[1] The substance of these authorities is as follows:—

I. 39 Hen. 6; 43 B. (Year Book).

II. *Beverly's Case* (4 Co. 126 b), cited to prove that the prerogative of the Crown which related to *non comp.* who were not idiots, as it only took away the custody and not the absolute ownership of the property of the *non comp.* was not odious nor strictly construed.

III. *Rochfort* vs. *Lord Ely*, 1 Ridg. Cas. 532.

IV. 3 Wash. C. C. R. 587, S. P. 9 Ves. 610, and 2 Dav. Parl. Cas. 283, cited to prove "that a man's capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business; as, for instance, to make contracts for the purchase and sale of property."

I. A common law question of pleading.

II. This is contrary to 3 Atk. 168, 1 Black. Com. 302, 1 Ridg. Cas.—*Lord Ely's Case*—before cited. Cf. also Lord HARDWICKE'S remarks, quoted 1 Ridg. Cas. App. 6. "*God forbid* that a weakness of mind only should be a sufficient reason for granting the *custody* of the person and estate."

III. Decided in 1767, before the meaning of the term "unsound mind" had been extended, and arose upon a commission of lunacy, involving the Crown right to the custody of the estate. In the same case (charge of GEORGE SMITH, Esq., p. 517), the strict rule is seemingly confined to "*inquiries of this sort.*" (Italics original.)

IV. If the Lispenard doctrine were true, there could not be one standard of capacity for wills and another for contracts. "Unsoundness of mind" is the ground of the incapacity in both cases; and if that term, as is claimed, has an exact definition, it must apply equally to both. Indeed, the words of the Statute of Fines (18 Edw. 1) disabling a person of "non sane memory" from making a "purchase and sale of property" in that form, are the very words upon which Lord COKE is commenting when he gives the definition of *non compos*, upon which the Lispenard doctrine rests.

they present a different bearing when viewed in the light of the historical facts already adverted to. Judge DAVIES, delivering the opinion of the court in the case, derives the principle of law relative to the rule of mental unsoundness from the later authorities, and finally adopts very nearly the language of Judge REDFIELD, in the case of *Converse* vs. *Converse*,[1] and holds that the testator must "have sufficient *active memory* to collect in his mind, *without prompting*, the particulars or elements of the business to be transacted, and to *hold them in his mind* a sufficient length of time to perceive at least their obvious relation to each other, and be able to form some *rational judgment* in relation to them. A testator who has sufficient mental power to do these things is, within the meaning and intent of the Statute of Wills, a person of sound mind and memory, and is competent to dispose of his estate."[2]

Although the rule as above expressed may be obnoxious in some respects to criticism, this arises from the difficulty, or rather the impossibility, of framing any rule at all upon a subject which does not admit of exact definitions, and a great part of which lies beyond the reach of human investigation. The importance of the decision consists in the fact that it takes a judicial view of imbecility, which more nearly accords with the established medical doctrines concerning that condition of mental deficiency. Psychologists have settled that there are degrees of imbecility, although they may not have agreed upon a classification of those degrees, and the rule of law, in conformity to this fact, now is, that testamentary capacity depends not merely upon the presence of a condition of mind one remove from idiocy, but upon the *degree of imbecility* of the testator. The rule however, as stated, does not directly assert that *all* of those whom physicians class under the head of imbeciles are rendered incapable of making a valid will.[3]

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[1] 21 Verm. 168.

[2] Judge Davies's Opinion, p. 14.

[3] The word *imbecility*, as a medical term, differs somewhat in signification from its popular meaning. In the latter sense it means *any* weakness of mind below the ordinary mental capacity of mankind, (Web. Dict. *in verb*) ; in the former it refers to an *abnormal* weakness of intellect. (Ray's Med. Jour. of Insan. 77.)

IV. The foregoing imperfect summary of the present legal doctrines upon the question of mental unsoundness in relation to testamentary capacity, and comparison of the rules of the Courts with the statements of medical writers, show that the former, in almost every case, harmonize with the latter as nearly as can be expected, and as nearly, perhaps, as is possible, in view of the widely different functions of the judge and the physician. It is a frequent subject of complaint among the latter class that the law does not keep pace with advancing medical science. But, from the necessity of the case, great caution must be observed in admitting a medical discovery to modify a rule of law. It would be as unwise to recognise a psychological fact not clearly established, as to ignore such a fact when settled beyond dispute. The rules of law, framed to secure justice to the citizen, must be expressed in certain terms and be universal in their application, and cannot always strictly coincide with the facts of medical experience.

Considered from any point of view, however, the history of the legal doctrines upon the subject under discussion affords an instance of the living principle animating our law, by which, in its gradual development, it conforms itself to the progress of knowledge and the wants and necessities of each successive age.

RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Maine.

MORRILL *et al. vs.* NOYES, RECEIVER, ETC.

The Y. & C. Railroad Company, in 1851, issued bonds for the purpose of finishing their railroad, and secured them by a mortgage, in trust, of their railroad and franchise, together with all engines and cars then owned, *or afterwards to be purchased and put upon the railroad.* In 1853 the company purchased an engine and certain cars, which, after being used for some time, they mortgaged to other parties. In 1859, a bill in equity was commenced by the holders of the bonds, against the Company and the assignees of the mortgage, to compel them to exe-